**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

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| KHASEEM GREENE,<br><br>Plaintiff,<br><br>v.<br><br>ELIZABETH POLICE DEPARTMENT, et al.,<br><br>Defendants. | | CIVIL ACTION NO.<br>2:18-cv-08972 |

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BRIEF IN SUPPORT OF UNION COUNTY PROSECUTOR DEFENDANTS' MOTION TO DISMISS

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## PRELIMINARY STATEMENT

This motion seeks dismissal of the claims against Defendants, the Union County Prosecutor's Office ("UCPO"), Patricia Cronin, Stephen Kaiser, Deborah White and Mark Spivey (together, "UCPO Defendants") by Khaseem Greene ("Greene"), which concern UCPO's performance of their classic law enforcement and investigatory functions as prosecutors concerning the bringing and pursuit of charges against Greene, for which UCPO Defendants undeniably have immunity under well-established law.

Plaintiff, Khaseem Greene, was arrested and charged in connection with an incident in which gunshots were fired into a crowd in Elizabeth, New Jersey, in the vicinity of the All Star Café, on December 3, 2016. Investigation of the incident led the Elizabeth police to conclude that Jason Sanders had fired the weapon used in the shooting. When Sanders was arrested, he told the investigating Elizabeth police officers that Greene had handed Sanders the weapon used in the shooting.

After the Elizabeth police relayed that information to UCPO, the filing of charges against Greene was approved by UCPO. Greene contends that charges should not have been filed because Sanders suggested at the end of his interview with police that he "lied" earlier about Greene's involvement, and because a representation that the Elizabeth police made about a video supposedly showing Greene passing the gun to Sanders was untruthful. As discussed herein, a prosecutor's decision to file and pursue criminal charges -- a decision that it is crucial that a prosecutor can make without fear of civil litigation, so that crime can be prosecuted vigorously -- is the subject of an absolute immunity. Even crediting Greene's claim

that Sanders "recanted" the portion of his statement implicating Greene, and Greene's representation that the video footage did not show him passing Sanders the weapon, unambiguous law precludes claims against UCPO Defendants for bringing and pursuing criminal charges against Greene.

Greene also brings claims against UCPO Defendants with respect to how the case against him was presented to a grand jury. Again, under longstanding and unambiguous law, prosecutors have absolute immunity with respect to claims about presentations by prosecutorial employees to grand juries.

Furthermore, claims against UCPO Defendants are barred by Eleventh Amendment immunity, as those defendants were acting in their role as representative of the State when pursuing their classic law enforcement and investigatory roles. On a related note, claims under federal law and the New Jersey Civil Rights Act ("NJCRA") against UCPO and the UCPO Defendants in their "official capacity" are barred, because they are not "persons" subject to suit under those statutes.

As for Greene's state law claims, they are also barred because the New Jersey Tort Claims Act provides immunity in N.J.S.A. 59:3-8 in connection with prosecuting any judicial proceeding that is within a defendant's scope of employment. In addition, N.J.S.A. 59:3-3 provides that a "public employee is not liable if he acts in good faith in the execution or enforcement of any law," which bars the state law claims except Greene's claims related to false arrest or false imprisonment (which are barred by N.J.S.A. 59:3-8). Greene's claim for defamation against defendant Spivey, a communications officer who merely relayed truthful

information about the fact that charges were brought and the allegations underlying those charges, also fail because Greene has failed to allege that any statement made by Spivey was willfully false.

Therefore, for the reasons set forth more fully herein, the claims against UCPO Defendants should be dismissed.

## STATEMENT OF FACTS[1]

### A. The December 3, 2016 Shooting and Subsequent Investigation

On or about December 3, 2016, a shooting occurred in the area of South Park Street and Third Street in Elizabeth, in the vicinity of All Star Cafe. (ECF Doc. No. 1, ¶ 26.) Police officers Mooney and Haverty of the Elizabeth Police Department ("EPD") were in the vicinity at the time, and they pursued and unsuccessfully attempted to stop a dark colored SUV leaving the area after the shooting, ultimately terminating their pursuit. (*Id.* at ¶27.) Subsequent investigation revealed that the SUV was registered to a romantic affiliate of Jason Sanders ("Sanders"), who was later arrested in connection with the shooting. (*Id.*) After the aborted vehicle pursuit, Mooney and Haverty returned to the All Star Cafe, where they were able to review video from All Star Cafe's surveillance cameras. (*Id.* at 29.) The gun used in the

[1] Given that this is a motion to dismiss on the pleadings, UCPO Defendants are required to state the facts as alleged in the Complaint, and the Court must accept the factual allegations of the Complaint (but not any conclusory statements unsupported by facts) in the light most favorable to the Plaintiffs. *See Phillips v. Cty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008). By setting forth the facts below for purposes of this motion, UCPO Defendants do not concede the truth of those allegations, many of which the UCPO Defendants would take issue with, if the claims against UCPO Defendants are not dismissed.

shooting was subsequently recovered on December 5, 2016, along the route that the dark colored SUV had taken during the December 3, 2016 pursuit. (*Id.* at 30.)

On or about December 19, 2016, a witness identified the shooter on the All Star Cafe video as "Big J" and, ultimately, as Jason Sanders, to EPD Detective Carmine Gianetia, and a day later, upon reviewing the video, EPD Sergeant Rodney Dorilus, who was familiar with Sanders from prior encounters, also identified Sanders as the shooter. (*Id.* at ¶¶ 32-33.) EPD officer Alfonso Colon ("Colon") conferred with Cronin of the UCPO about the investigation, and on December 23, 2016, Cronin approved the filing of charges against Sanders, which was followed by Sanders arrest on December 30, 2016. (*Id.* at ¶¶ 34-37.)

On or about December 30, 2016, Colon, with the assistance of EPD officer James Szpond (Szpond"), conducted a video interview of Sanders, during which Sanders stated that Greene had handed him the gun used in the shooting. (*Id.* at ¶ 38.) According to the Complaint, near the end of that interview, when "asked whether the information he provided regarding [Greene] was true," Sanders "told the police that he 'lied'" but the officers supposedly told Sanders, "You can recant at another time. Not tonight." (*Id.* at ¶ 39.)

**B. The Charges Against Greene**

After Sander's interview, Colon updated Cronin about the investigation and Cronin approved the filing of charges against Greene, after which Colon prepared a Complaint-Warrant that included statements that Greene "was observed on surveillance video handing over a handgun" to Sanders and that Sanders "admit[ted] that [Plaintiff] handed him the handgun." (*Id.* at ¶¶ 41-43.) Greene contends that the video of the shooting to not show him

passing a gun to Sanders. (*Id.* at ¶ 43.) After Greene had appeared at EPD with his attorney on January 5, 2017, with respect to the charges, Colon closed the case pending presentation to a grand jury. (*Id.* at ¶¶ 46-47.)

On or about May 9, 2017, the grand jury indicted Greene. (*Id.* at ¶ 48.) Greene alleges that UCPO defendant "Kaiser along with [UCPO defendant] White and/or on White's orders" presented to the grand jury "manufactured, fabricated evidence," by which the Complaint means the grand jury, through testimony provided by Colon, was told: (1) that Sanders had said that Greene handed him the gun used in the shooting; and (2) that the surveillance video from the All Star Cafe showed Greene handing Sanders the gun. (*Id.* at ¶¶ 48-49.)

Greene was a professional football player who, at the time of the indictment, was in camp with the Kansas City Chiefs of the National Football League on a futures contract and seeking to make that team's regular season roster. (*Id.* at ¶ 54.) The Complaint notes that several media sources reported Greene's indictment, including the basis of the claims against him. (*Id.* at ¶¶ 50-52.) Greene claims that the Chiefs informed him on May 9, 2017, that he was being cut, which Greene's agent allegedly told him was "due to the indictment released earlier that same day." (*Id.* at ¶ 54.) The Complaint alleges that UCPO Communication Officer Mark Spivey had notified the press of Greene's indictment and conveyed that Greene could be observed on surveillance video handing a gun to Sanders and that Sanders had stated that Greene handed him the gun used in the shooting. (*Id.* at ¶ 53.)

Greene retained Schiller McMahon LLC to represent him in connection with the criminal charges against him, and he was arraigned on May 22, 2017, after which his counsel was in contact with UCPO defendants Kaiser and White, seeking a dismissal of the indictment, in part because the impending opening of NFL training camps. (*Id.* at ¶¶ 56-58.) UCPO initially declined to dismiss the charges, but did ultimately dismiss them on July 17, 2017. (*Id.* at ¶¶ 59-60, 70.)

While the charges were pending, Greene's counsel filed various motions and sent various letters to the Court, seeking either dismissal of the indictment against Greene because of alleged government misconduct and alleged lack of probable cause, or seeking emergent hearings or a prompt trial. (*Id.* at ¶¶ 61-67.) The Complaint alleges that Greene was informed by UCPO's trial supervisor Doreen Yanik on July 12, 2017, that the State no longer contended that Greene "possessed and/or passed Sanders any object, let alone a firearm," and that Greene was offered at that time admission in the Pre-Trial Intervention ("PTI"), which Greene rejected. (*Id.* at ¶¶ 68-69.)

On July 17, 2017, UCPO secured an order from the criminal court that dismissed the indictment against Greene. (*Id.* at ¶ 70.)

## STANDARD OF REVIEW

**Motion to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).**

A complaint may be dismissed for failure to state a claim for which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6). On a

motion to dismiss pursuant to Rule 12(b)(6), a reviewing court must accept the plaintiff's factual allegations as true. *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990).

However, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where the claims asserted are fatally defective and the plaintiff cannot plead any facts to support his claims, it is appropriate for the court to dismiss a complaint without permitting the plaintiff to make a curative amendment of his pleading. *Oran v. Stafford*, 34 F. Supp. 2d 906, 913-14 (D.N.J. 1999), *aff'd*, 226 F.3d 275 (3d Cir. 2000). Thus, dismissal for failure to state a claim is justified where, as in this case, there is an "insuperable barrier" to a claim, such as immunity. *See Flight Sys., Inc. v. Elec. Data Sys.*, 112 F.3d 124, 127-28 (3d Cir. 1997); *Camero v. Kostos*, 253 F. Supp. 331, 338 (D.N.J. 1966).

## ARGUMENT

### POINT I

### UCPO DEFENDANTS HAVE SOVEREIGN IMMUNITY FROM PLAINTIFF'S FEDERAL LAW AND NJCRA CLAIMS.

The Eleventh Amendment bars federal jurisdiction over private lawsuits against a state:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.
>
> [U.S. Const. Amend. XI.]

The Eleventh Amendment prohibits suits against a state not only by citizens of another state, but also by its own citizens. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527

U.S. 627, 669-70 (1999). In addition, Eleventh Amendment immunity extends to state departments and agencies that are arms of the State. *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 545 (3d Cir. 2007) (citing *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429 (1997)). The Eleventh Amendment prohibition against federal lawsuits for damages against the State also applies when a state official is sued for damages in his or her official capacity. *Kentucky v. Graham*, 473 U.S. 159 (1985).

The law in this Circuit makes clear that, when county prosecutors and/or investigators assisting county prosecutors engage in law enforcement and investigative functions, they act as officers of the State rather than the county. *Coleman v. Kaye*, 87 F.3d 1491, 1505 (3d Cir. 1996) (abrogated on other grounds). The Third Circuit in *Coleman* stated:

> [I]t is well established that when county prosecutors execute their sworn duties to enforce the law by making use of all the tools lawfully available to them to combat crime, they act as agents of the State.
>
> [*Id.* at 1499.]

The Third Circuit reaffirmed that same conclusion in *Beightler v. Office of Essex Cty. Prosecutor*, 342 Fed.Appx. 829 (3d Cir. August 29, 2009), stating that "that county prosecutors act[] as arms of the state when they perform[] . . . classic law enforcement and investigative functions." *Id.* at 832-33 (citing *Coleman*, 87 F.3d at 1499-505).

The Third Circuit has distinguished acts that are not considered state action as follows:

> On the other hand, when county prosecutors are called upon to perform administrative tasks unrelated to their strictly prosecutorial functions, such as a decision whether to promote an investigator, the county prosecutor in effect acts on behalf of the county that is the situs of his or her office.

[*Coleman*, 87 F.3d at 1505.]

Courts in this Circuit have consistently held that prosecutors and those working in the prosecutors' offices enjoy immunity with respect to the same types of claims that Plaintiff has made here. *See, e.g.*, *Woodyard v. County of Essex*, 514 Fed.Appx. 177 (3d Cir. March 5, 2013) (finding Essex County Prosecutor's Office entitled to sovereign immunity against claims that office arrested and detained plaintiff without probable cause); *Beightler*, 342 Fed.Appx. 829 (holding Essex County Prosecutor enjoyed sovereign immunity for charging suspect arrested trying to carry disassembled weapon onto plane); *Hyatt*, 340 Fed.Appx. 833 (holding Passaic County Prosecutor's Office and prosecutors enjoyed sovereign immunity for claims related to arrest); *In re Camden Police Cases*, 2011 WL 3651318 (finding that Camden County Prosecutor's Office was immune from suit due to sovereign immunity); *Mikhaeil v. Santos*, 2011 WL 2429313 at *4 (D.N.J. June 13, 2011) (Martini, J.) (barring, on Eleventh Amendment grounds, all § 1983 claims brought against State of New Jersey and its agencies, including Hudson County Prosecutor's Office), *aff'd*, 646 Fed.Appx. 156 (3d Cir. April 13, 2016); *Paez v. Lynch*, 2009 WL 5171858 at *4 (D.N.J. December 23, 2009) (Cavanaugh, J.) (finding Hudson County Prosecutor "arm of the state" for Eleventh Amendment purposes and therefore protected by sovereign immunity).

Moreover, this sovereign immunity bars not only Plaintiff's § 1983 claims, but also applies to his claims under the NJCRA. *Lopez-Siguenza*, 2014 WL 1298300 , at *5 (noting "courts in the District of New Jersey have held that Eleventh Amendment sovereign immunity applies to claims under the NJCRA.") (citing *Slinger v. New Jersey*, Civ. 07-5561 (DMC), 2008

WL 4126181, at *5 (D.N.J. Sept. 4, 2008), *rev'd in part*, 366 Fed.Appx 357 (3d Cir. 2010) (dismissing all NJCRA claims against State because "[t]raditional common law principles, contemporary principles of statutory construction and common sense all demonstrate that the NJCRA does not pierce the State's sovereign immunity."); *Estate of Lydia Joy Perry ex rel. Kale v. Sloan*, Civ. 10-4646 (AET), 2011 WL 2148813, at *2 (D.N.J. May 31, 2011); *Green v. Corzine*, Civ. 09-1600, 2011 WL 735719, at *7 (D.N.J. Feb. 22, 2011)).

The allegations against UCPO Defendants in this case fall within this immunity, because they concern law enforcement and investigatory functions such as deciding to bring and pursue criminal charges based on information provided to UCPO Defendants by the EPD officers who were investigating the incident. Likewise, presentation of information and testimony before a grand jury are classic law enforcement functions that are subject to Eleventh Amendment immunity. *Coley v. County of Essex*, 462 Fed.Appx. 157, 161-62 (3d Cir. 2011); *Woodyard*, 514 Fed.Appx. at 182.

## POINT II

### PLAINTIFF'S § 1983 CLAIMS AGAINST PROSECUTOR DEFENDANTS IN THEIR "OFFICAL CAPACITIES" SHOULD BE DISMISSED BECAUSE THEY ARE NOT "PERSONS" UNDER § 1983.

The individual Prosecutor Defendants cannot be sued in their "official capacity" under 42 U.S. § 1983, because, in their official capacities, they are not "persons" amenable to suit under that statute. The Supreme Court has unequivocally held that States and State officials "are not 'persons' within the meaning of § 1983 and, therefore, cannot be among those held liable for violations of the civil rights statute." *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690,

697 (3d Cir. 1995); *Will* v. Michigan Dept. of State Police, 491 U.S. 58, 70-71 (1989). Moreover, the Third Circuit has specifically held that "when county prosecutors engage in classic law enforcement and investigative functions, they act as officers of the State." *Coleman*, 87 F.3d at 1505.

Thus, all claims under § 1983 against Prosecutor Defendants should be dismissed with prejudice.

## POINT III

### PLAINTIFF'S CLAIMS AGAINST PROSECUTOR DEFENDANTS, IN THEIR INDIVIDUAL CAPACITIES MUST BE DISMISSED BECAUSE THEY HAVE ABSOLUTE PROSECUTORIAL IMMUNITY FROM SUCH CLAIMS.

Even if Plaintiff's claims were not subject to dismissal based on the grounds already set forth, longstanding and unambiguous Supreme Court precedent affords prosecutorial employees with absolute immunity from liability in civil suits for actions taken in their role as prosecutors. *Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976). That immunity is founded in the concern that "harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423. As the Court observed, if subject to suit, the prosecutor might become "constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Id.* at 424-25. Indeed, "[s]uch suits could be expected with some frequency,

for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." *Id.* at 425.

Absolute prosecutorial immunity also applies to all pre-trial and trial stages of criminal proceedings, where the prosecutor acts as an advocate for the State. *Kalina v. Fletcher*, 522 U.S. 118 (1997). To that end, absolute immunity applies to all activities that are "intimately associated with the judicial process," and shields a prosecutor from liability for any and all alleged wrongdoing that the prosecutor is alleged to have committed while an advocate for the state. *Imbler*, 424 U.S. at 430; *Kulwicki v. Dawson*, 969 F.2d 1454, 1463 (3d Cir. 1992). While this immunity includes actions taken as an advocate before the court, it also extends to certain out-of-court conduct, *Kulwicki*, 969 F.2d at 1463, including investigatory acts, "to the extent that the securing of information is necessary to a prosecutor's decision to initiate a criminal prosecution itself." *Forsyth v. Kleindienst*, 599 F.2d 1203, 1215 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981).

Furthermore, "absolute immunity protects a prosecutor in the performance of investigative functions to the extent that the investigation is 'intimately associated with the judicial phase of the criminal process.'" *Black v. Bayer*, 672 F.2d 309, 320 (3d Cir.) (quoting *Ross v. Meagan*, 638 F.2d 646, 648 (3d Cir. 1981), *cert. denied sub nom.*, *Stoica v. Stewart*, 459 U.S. 916 (1982)). Thus, a prosecutor has immunity for both the use and solicitation of evidence in connection with a prosecution. *See Burns v. Reed*, 500 U.S. 478, 485 (1991). Indeed, even a "malicious or dishonest action" by a prosecutor is entitled to absolute immunity, so long as the action is part of the judicial process. *Imbler*, 424 U.S. at 430-32 (holding prosecutor enjoyed

absolute immunity from suit alleging that he maliciously initiated prosecution, used perjured testimony at trial, or suppressed material evidence at trial). Such immunity also applies to a failure to disclose allegedly exculpatory evidence is protected by absolute prosecutorial immunity. *Yarris v. County of Delaware*, 465 F.3d 129, 137 (3d Cir. 2006).

Consistent with the Supreme Court's direction, courts in this Circuit have recognized that "absolute prosecutorial immunity is a valid defense to an individual capacity suit." *Lopez-Siguenza*, 2014 WL 1298300 at *8 (D.N.J. March 31, 2014) (citing *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985)).

The claims against UCPO Defendants include the decision to bring charges against Greene and as to an alleged delay in the dismissal of those charges. UCPO Defendants undeniably have immunity as to such claims. The Third Circuit has held that the arrest of a criminal defendant and the filing of charges are at the core of the prosecutorial function, and therefore that a "prosecutor is absolutely immune when making [the decision to initiate a prosecution], even where he acts without a good faith belief that any wrongdoing has occurred." *Kulwicki v. Dawson,* 969 F.2d 1454, 1464 (3d Cir. 1992). Thus, even crediting the allegation in the Complaint that UCPO Defendants were supposedly aware that the surveillance video did not show Greene handing a gun to Sanders and that UCPO Defendants were aware that Sanders had admitted to lying when he said Greene gave him the gun, Kulwicki makes clear that UCPO Defendants nonetheless still have absolute immunity from such claims.

Allegations that UCPO Defendants submitted "fabricated and manufactured" evidence to the grand jury or solicited "perjured" testimony from Cronin, even if accepted as true for the purpose of this motion to dismiss, still are subject to absolute prosecutorial immunity. The United States Supreme Court has held that absolute prosecutorial immunity applies even to claims that a prosecutor solicited false testimony from a witness in a grand jury proceeding, *see Burns v. Reed*, 500 U.S. 478, 490 (1991), and that immunity has been recognized by more recent Third Circuit precedent, *see Kulwicki*, 969 F.2d at 1467.

To the extent that Greene claims that the prosecution disclosed that Sanders had identified Greene as the person who handed him the gun, but had not also presented the exculpatory fact that Sanders supposedly recanted that testimony, absolute immunity still applies. "It is well settled that prosecutors are entitled to absolute immunity from claims based on their failure to disclose exculpatory evidence, so long as they did so while functioning in their prosecutorial capacity . . .. [T]he 'deliberate withholding of exculpatory information' is included within the 'legitimate exercise of prosecutorial discretion.'" *Yarris v. County of Del.,* 465 F.3d 129, 137 (3d Cir.2006) (quoting *Imbler,* 424 U.S. at 431–32 n. 34). This immunity applied to the withholding of exculpatory evidence during a presentment to a grand jury. *United States v. Williams,* 504 U.S. 36, 51 (1992); *Yarris,* 465 F.3d at 137 (finding state prosecutors "absolutely immune from claims based on allegations that they 'intentionally concealed' exculpatory evidence *prior* to trial").

## POINT IV

### GREENE'S CONCLUSORY CLAIMS BASED ON ALLEGED DISCRIMINATION AGAINST HIM, AND THE SCREENING, HIRING AND TRAINING OF EMPLOYEES WITH ALLEGED DISCRIMINATORY TENDENCIES FAIL AS A MATTER OF LAW.

In several places in the Complaint, Greene alleges in conclusory fashion that the defendants, including UCPO Defendants, "were motivated by racial, ethnic, national origin, and/or other unlawful animosity and/or by desire to injure, oppress and intimidate the Plaintiff because of his race, ethnicity, national origin, or other protected attribute." See e.g., ECF, Doc. No. 1, ¶¶ 93, 95). The Complaint does not event state which of these factors -- his race, ethnicity, national origin, or some other unidentified but nonetheless protected attribute – supposedly motivated UCPO Defendants, nor does he point to any factual basis for the blanket statement that such animus motivated UCPO Defendants. With respect to his failure to screen and train claims, he offers no factual basis that any improper bias was known.

Greene's conclusory allegations of violation of his civil rights due to some unspecified discrimination against him, for some unspecified basis, fails as a matter of law. Bare allegations of discrimination are insufficient to survive a motion to dismiss on the pleadings. *Iqbal*, 556 U.S. at 680-81. That is even more true here when the complaint at issue cannot even decide what the supposed reason is for the alleged discrimination.

Furthermore, the law is clear that any training that UCPO Defendants provided to UCPO personnel is a classic law enforcement function, and thus is also subject to absolute prosecutorial immunity as well as sovereign immunity. Courts have plainly stated that it is a

state function to supervise and/or train law enforcement personnel regarding those employees' law enforcement/investigative roles. *See Hyatt v. Cnty. of Passaic*, 340 Fed.Appx 833, 837 (3d Cir. 2009) (finding that procedures, policy, and training regarding sexually abused child witnesses required legal knowledge and discretion and therefore was related to prosecutorial function); *Pitman v. Ottehberg*, 2011 WL 6935274 (D.N.J. Dec. 30, 2011) (Hillman, J.) (citing Van de Kamp v. Goldstein, 555 U.S. 335, 344 (2009))(holding training and supervision of prosecutors is a state function); *Landi v. Borough of Seaside Park*, 2009 WL 606141 (D.N.J. March 9, 2009) (Wolfson, J.) (holding that providing training to investigators regarding law enforcement actions is prosecutorial task afforded sovereign immunity); *In re Camden Police Cases*, 2011 WL 3651318 (D.N.J. Aug. 18, 2011) (Kugler, J.)(holding that training and supervision of police officers is prosecutorial function to which sovereign immunity applies).

## POINT V

## UCPO DEFENDANTS HAVE QUALIFIED IMMUNITY FOR GREENE'S CLAIMS

Even accepting as true the facts as alleged in the complaint, UCPO Defendants are, at minimum, entitled to qualified immunity from Greene's claims.

Qualified immunity is designed to accommodate the competing values between providing a cause of action for the deprivation of constitutional rights and the need for public officials to discharge their discretionary powers without undue fear of personal liability. *Curley v. Klem*, 499 F.3d 199, 206 (3d Cir. 2007) (citations omitted). Moreover, the doctrine applies regardless of whether the official's error is a mistake of law, a mistake of fact or a mistake based on mixed questions of law and fact. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The

immunity is necessarily "broad in scope and protects" public officials except those who are "plainly incompetent" or "knowingly violate the law." *Curley*, 499 F.3d at 206 (citations omitted). Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. ___, ___, 131 S. Ct. 2074, 2080 (2011) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). This immunity grants officials "breathing room to make reasonable but mistaken judgments about open legal questions," thereby protecting "all but the plainly incompetent or those who knowingly violate the law." *al-Kidd*, 131 S. Ct. at 2085.

"[W]hether an officer made a reasonable mistake of law and is thus entitled to qualified immunity is a question of law that is properly answered by the court, not a jury." *Curley*, 499 F.3d at 211 (citing *Carswell v. Borough of Homestead*, 381 F.3d 235, 242 (3d Cir. 2004)). To determine the "contours" of the right at issue, the Court in *al-Kidd* held that absent "controlling authority," a "robust consensus of cases of persuasive authority" must have placed the statutory or constitutional question confronting the officials "beyond debate." *Id.* at 2083-84. In this regard, the Court has repeatedly cautioned lower courts "not to define clearly established law at a high level of generality . . . since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, 572 U.S. ___, ___, 134 S. Ct. 2012, 2023 (2014) (citation and internal quotes omitted). Consistent with this admonition, the Supreme Court has recently devoted much attention to the "clearly established" prong of the qualified immunity analysis and has reversed

several lower courts that either distilled a "clearly established" right from inapposite precedent, or defined the right too generally to place government officials on sufficient notice. *See City and Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015); *Taylor v. Barkes*, 2015 U.S. LEXIS 3715 (2015); *Carroll v. Carman*, 574 U.S. ___, 135 S. Ct. 348 (2014); *Plumhoff*, 134 S. Ct. 2012; *Stanton v. Sims*, 571 U.S. ___, 134 S. Ct. 3 (2013); *Reichle v. Howards*, 566 U.S. ___, 132 S. Ct. 2088 (2012); *al-Kidd*, 131 S. Ct. 2074 (2011).

Here, Greene cannot identify any clearly established authority or "robust consensus of persuasive authority" that a suspect's constitution rights are violated when a prosecutor relies on the statement of one suspect involved in a crime that implicates another suspect when that initial suspect might later recant his initial statement against the second suspect. Because Greene has failed to identify any such authority, and therefore cannot show that UCPO Defendants violated any established constitutional right, UCPO Defendants are entitled to qualified immunity as to the claims against them.

Qualified immunity likewise exists if a defendant had probable cause to pursue a criminal case against a suspect. Probable cause is "defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975). A court must look at the "totality of the circumstances" and use a "common sense" approach to the issue of probable cause. *United States v. Glasser*, 750 F.2d 1197, 1205 (3d Cir. 1984), *certif. denied*, 471 U.S. 1018 (1985). As the Supreme Court recently observed, "Probable cause "is not a high bar." District

of Columbia v. Wesby, __ U.S. __, 138 S.Ct. 577, 586 (2018) (quoting Kaley v. United States, 571 U.S. __, 134 S.Ct. 1090, 1103 (2014)).

In this case, it is undisputed that one suspect in this case, Sanders -- who was confirmed as the shooter by video evidence and his own statement admitting his own involvement -- identified Greene as being involved in the shooting. Even if some of the other information in the case was exculpatory in favor of Greene (including an alleged subsequent statement by Sanders), Sanders's statement implicating Greene, on its own, was enough to meet the probable cause standard, which it "not a high bar."

## POINT VI

### UCPO DEFENDANTS HAVE IMMUNITY FROM GREENE'S STATE LAW CLAIMS FOR MALICIOUS PROSECUTION, ABUSE OF PROCESS, NEGLIGENCE AND DEFAMATION

Prosecutorial immunity as to state law claims is provided within the New Jersey Tort Claims Act ("TCA") in N.J.S.A. 59:3-8, which provides:

> A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment.

This immunity is limited only by N.J.S.A. 59:3-14a, which provides:

> Nothing in this act shall exonerate a public employee from liability if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct.

The allegations of the Complaint do not allege conduct by UCPO Defendants that would constitute "a crime, actual fraud, actual malice or willful misconduct" by Prosecutor

Defendants, and therefore, these defendants are entitled to dismissal based on N.J.S.A. 59:3-8. Plaintiff offers no factual basis for any allegation that Prosecutor Defendants bore any malice towards Plaintiff, or engaged in willful misconduct.

Moreover, to the extent that dismissal is not required by N.J.S.A. 59:3-8, Prosecutor Defendants nonetheless are entitled to dismissal pursuant to N.J.S.A. 59:3-3, which provides that a "public employee is not liable if he acts in good faith in the execution or enforcement of any law," except in instances of false arrest or false imprisonment.

In analyzing the immunity provided by N.J.S.A. 59:3-3, New Jersey courts have adopted the objective good-faith standard announced by the Supreme Court in *Harlow v. Fitzgerald,* 457 U.S. 800, 817–18 (1982). *See Hayes v. Mercer Cty.,* 526 A.2d 737, 741 (N.J. Super.Ct. App. Div. 1987). The *Harlow* standard shields pubic officials from bare allegations of malice when their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 817–18.

As noted above in the context of UCPO Defendants' qualified immunity from Pierre's federal law claims, none of the allegations as to UCPO Defendants rise to the level of the violation of a "clearly established statutory or constitutional right." Therefore, even accepting as true the allegations in the Complaint, Prosecutor Defendants are entitled to immunity under N.J.S.A. 59:3-3.

## POINT VII

### ABUSE OF PROCESS CLAIMS APPLY ONLY TO CIVIL ACTIONS FILED AGAINST A PARTY, AND THEREFORE THE ABUSE OF PROCES CLAIM FAILS AS A MATTER OF LAW

Count Eight of the Complaint asserts a cause of action for "abuse of process." Under New Jersey law, such a claim may be pursued only with respect to the filing of a civil law suit. *LoBiondo v. Schwartz*, 970 A.2d 1007, 1023 (N.J. 2009). Because Plaintiff's claims involve the institution of criminal proceedings, he may not maintain a cause of action for abuse of process against UCPO Defendants, and that claim should be dismissed.

## POINT VIII

### GREENE'S DEFAMATION CLAIM FAILS AS A MATTER OF LAW BECAUSE HE CANNOT DEMONSTRATE BY CLEAR AND CONVINCING EVIDENCE THAT SPIVEY KNOWINGLY AND WITH MALICE MADE FALSE STATEMENTS, AND THE INFORMATION DISCLOSED IS MANDATORY TO DIVULGE UNDER NEW JERSEY'S OPRA STATUTE

In cases involving claims of defamation, two competing interests must be balanced – "the rights of individuals 'to enjoy their reputations unimpaired by false and defamatory attacks,' and the right of individuals to speak freely and fearlessly on issues of public concern in our participatory democracy.'" *Senna v. Florimont*, 958 A.2d 427, 433 (2008) (quoting *Swede v Passaic Daily News*, 153 A.2d 36, 42 (1959)). Historically, defamation claims have been viewed "as a remedy for those who 'abuse' the right to speak and write freely." *Id.* at 434.

The New Jersey Supreme Court has set forth that, in addition to damages, the elements of a defamation claim are as follows: "(1) the assertion of a false and defamatory statement

concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting to at least negligence by the publisher." *DeAngelis v. Hill*, 847 A.2d 1261, 1267-1268 (2004). It is a plaintiff's burden to prove each element of the defamation claim by clear and convincing evidence. *Russo v. Nagel*, 817 A.2d 426, 431 (2003).

"A defamatory statement is one that is false and 'injurious to the reputation of another' or exposes another person to 'hatred, contempt or ridicule' or subjects another person to 'a loss of the good will and confidence' in which he or she is held by others." *Romaine v. Kallinger*, 537 A.2d 284, 287 (1988) (internal citations omitted). To determine whether a statement is defamatory on its face, courts "must scrutinize the language 'according to the fair and natural meaning which it will be given by reasonable persons of ordinary intelligence.'" *Russo*, 817 A.2d at 431 (quoting *Romaine*, 537 A.2d at 284). Moreover, in determining whether the language in question is defamatory the court must view the publication as a whole and consider the context in which the statements is used. *See Kamell v. Campbell*, 501 A.2d 1029, 1032 (1985); *Molnar v. Star-Ledger*, 471 A.2d 1209, 1212 (1984); *Dressler v. Mayer*, 91 A.2d 650, 653 (1952).

In New Jersey, in a claim for defamation, "proof of fault-negligence or actual malice is now always required in a defamation case." *Senna v. Florimont*, 958 A.2d at 439 (citing *Costello v. Ocean County Observer*, 643 A.2d 1012, 1021 (1994). New Jersey has provided greater protection to "statements involving matters of public concern, regardless of whether the targets of the statements are public figures or private persons." *Durando v. Nutley Sun*, 37 A.3d 449, 458 (2012). Further, the "actual malice standard applies to all speech-based torts involving matters of public concern or public officials." *Id.* (citing *DeAngelis*, 1847 A.2d at

1264, 1271.) A statement made with actual malice requires that the statement was made knowing it was false or with reckless disregard for whether it was false or not. *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964). To establish "reckless-disregard-for-the-truth," the plaintiff must prove that the defendant made the statement with a high degree of awareness of [the statement's] probable falsity." *Durando,* 37 A.3d at 459 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

Judged by these high standards, Greene's defamation claim plainly fails. Given that statements from a prosecutor's office plainly "involve matters of public concern," the actual malice standard applies in this case. As the complaint alleges, defendant Spivey was merely the "Director of Communications" for UCPO, without any actual involvement in the investigation or bringing of charges against Greene. As such, there is plainly no basis to suggest that Spivey was intimately familiar with the investigation or has reviewed the evidence in the criminal case against Greene and would have been aware of any alleged false statements about Sanders having implicated Greene, or alleged misleading statements about the contents of surveillance videos.

To the extent that Spivey might have imparted information to the press, it is beyond dispute that the information he may have provided would have been consistent with the contents of the criminal complaint against Greene and the grand jury indictment. Under the guidelines for disclosures to the press under the New Jersey Open Public Records Act ("OPRA"), the contents of any criminal complaint and/or indictment are mandated to be provided upon a request by the press. Specifically, OPRA guidelines in N.J.S.A. 47:1A-3b

mandate, upon any request for same, the public disclosure of information concerning criminal investigations in New Jersey, which includes "if an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information," "information as to the text of any charges such as the complaint," "information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest," and "information as to circumstances surrounding bail, whether it was posted and the amount thereof." Given that Spivey is alleged to have conveyed only information whose disclosure New Jersey law would mandate be made public, Spivey (and UCPO, which Greene claims is vicariously liable for any statements by Spivey) cannot be found to have defamed Greene.

## CONCLUSION

Based on the foregoing, Plaintiffs' Complaint should be dismissed as to the Prosecutor Defendants

Respectfully submitted,

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